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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

NOTICE OF MTION No. 1239 OF 2007
IN
SUIT No. 913 OF 2007

Mr. Ashok L. Kothari Plaintiff

Vs.

Smt. Koynabai S. Kadam & Ors. Defendants

Mr. Harendra Toor, advocate, i/b S. K. Legal Associates for the applicant/plaintiff.

Mr. V. B. Mahadik, advocate for the defendant Nos. 2 and 3.

CORAM : S.J. VAZIFDAR, J.

DATE : AUGUST 28, 2007.

PC

. The suit is filed for a declaration that an agreement of sale dated 5th July 1971, an agreement 5th October 1972 and two deeds of confirmation both dated 16th May 1997 are null & void and not binding on the plaintiff, for a declaration that defendant Nos. 1 and 2 had no right, title and interest in the suit property, and for an injunction restraining the defendants from holding themselves out to have any right in the suit property and from selling, transferring, assigning etc. the suit

property.

2. One Lalchand Kothari expired in 1982. His son the plaintiff, made an application for letters of administration/ succession certificate.

3. There is no dispute that the suit property belonged to said Lalchand Kothari. The defendants however claimed to have acquired an interest in the property, by virtue of aforesaid documents.

4. By the said agreement for sale dated 5th July 1971 the deceased is alleged to have agreed to sell the said property admeasuring 1471 Sq. mts. for of Rs.51,000/- to defendant No.1. Admittedly, this agreement was not registered.

5. Defendant No.1 alleges to have sold the said property in turn to the second defendant's husband by an agreement dated 5th October 1972 for a consideration of Rs. 3,51,000/-. This agreement was also admittedly not registered at the relevant time.

6. Therefore, 25 years later on 16th May 1997 the said deeds of confirmation are alleged to have been executed in respect of the aforesaid agreements. One of the said deeds of confirmation is in respect of the agreement dated 5th July 1971 and the other is in respect of alleged agreement dated 5th October 1972.

7. It is pertinent to note that the deeds of confirmation were executed twenty five years after the alleged documents. Secondly the deed of confirmation dated 5th October 1972 is purportedly executed by defendant No.1 as the constituted attorney of the deceased, by affixing her thumb impression. The deceased had expired in 1982. Thus, even assuming that a power of attorney was actually given in her favour, the same came to an end upon the death of the deceased. The deed of confirmation is therefore, at least prima facie void and illegal.

8. It is also pertinent to note that there is nothing on record which establishes how defendant No.2 inherited the property from her husband.

9. It is only in December 2006, that a right was sought to be asserted by the defendants in respect of the said property. Defendant No.3 claims to be the developer of the said property on behalf of defendant No.2. Public notices were issued. The plaintiff and his advocate responded to the same promptly. A police complaint was also filed on 29th December 2006

10. It is also pertinent to note that no proceedings have been adopted by the defendants while asserting their rights, under the alleged agreements. Prima facie at least it appears difficult to accept the contentions of the defendants that they have any right in respect of the plaintiff's suit property inter-alia as the agreements have not even been registered. Moreover, it is difficult to believe that a property admeasuring 1746 Sq. mt. was sold though tenanted and even in 1971 at the price of Rs.51,000/- by the deceased to the defendant No.1. Defendant No.1 has not filed any affidavit in reply.

11. Prima facie at least it also appears that possession of the property is not with the

defendants. The plaintiff has categorically affirmed that he is collecting the rents from various tenants. The plaintiff has produced certain rent receipts. The plaintiff has also produced the receipt book in respect of the rent. The defendants have on the other hand relied upon certain receipts from the authorities regarding payment of statutory dues. The receipts however, are in the name of the deceased, although it is true that it is mentioned that the payments were received from the husband of defendant No.2. It is also pertinent to note that it is not even the defendants' case that after the alleged agreement dated 5th July 1971 they or any of them collected rents from the tenants and actually took physical possession of the said property.

12. Prima facie therefore, the possession appears to be that of plaintiff. I say this, despite the fact that the application for appointment of Court Receiver has been made and an order for possession is sought. The same appears however to be through inadvertenance. In the body of the plaint, the plaintiff has averred that he is in possession.

13. It is clarified however, that the finding regarding possession as well as on merits, is only prima facie. It will always be open to the defendants to establish their case in the event of their adopting any proceeding for establishing their alleged rights.

14. In the circumstances, the Notice of Motion is made absolute in terms of prayer Clause (b) and (c), except the words bracketed in red. The plaintiff however, shall maintain status-quo in respect of the suit property for a period of 8 weeks from today.